

IN THE COURT OF COMMON PLEAS
PIKE COUNTY, OHIO

THE STATE OF OHIO :
Plaintiff, : Case No. 2018CR000159
-VS- :
FREDERICKA CAROL WAGNER : JUDGE RANDY D. DEERING
Defendant. :

**STATE'S MEMORANDUM CONTRA DEFENDANT'S MOTION TO DISMISS
INDICTMENT AND STATE'S MOTION TO STRIKE**

The Defendant's Motion to Dismiss is an improper pretrial motion under Crim. R. 12 and must be presented as a motion for acquittal at trial pursuant to Crim. R. 29. A trial court's consideration of a pretrial motion to dismiss is an improper exercise of judicial authority when it would decide what would be the general issue at trial. For the reasons further articulated in the memorandum below, the State respectfully requests that this Court overrule the Defendant's premature Motion to Dismiss. The State additionally requests that the Court strike the Defendant's Motion.

I. Defendant's Motion Should be Denied Because It is Incapable of Determination Without a Trial of the Issue.

Defendant's pretrial Motion to Dismiss is governed by Rule 12 of the Ohio Rules of Criminal Procedure, which states in relevant part:

Rule 12. Pleadings and motions before trial; Defenses and objections

(C) Pretrial motions. Prior to trial, any party may raise by motion any defense, objection, evidentiary issue, or request that is capable of determination without the trial of the general issue.

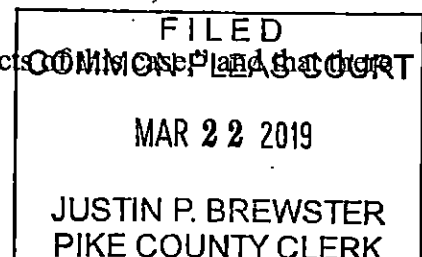
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COMMON PLEAS COURT
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JUSTIN P. BREWSTER
PIKE COUNTY CLERK

The plain language of Crim. R. 12 requires this Court deny Defendant's motion, as it raises a matter that is *not* capable of determination without the trial of the general issue.

When reviewing a pretrial motion to dismiss a criminal action, the trial court can only consider the face of the charging instrument, and must deny any motion to dismiss if the indictment is valid on its face. *State v. Daily*, 4th Dist. Athens No. 97CA25, 1998 Ohio App. LEXIS 214, *4 (Jan. 15, 1998), citing *State v. Edwards*, 9th Dist. Lorain No. 97CA6660, 1997 Ohio App. LEXIS 5148 (Nov. 12, 1997). A motion to dismiss filed in the criminal context must "test the sufficiency of the indictment *without regard to the quantity or quality of evidence that may be produced* by either the state or the defendant." *Daily*, at *3 (emphasis added).

The authority cited by Defendant in support of her position that a Crim. R. 12(C) motion to dismiss is a proper mechanism to deal with a defective indictment is inapplicable in this case, because Defendant's indictment is not defective. (Motion to Dismiss, p. 14). *State v. Palmer*, 131 Ohio St. 3d 278, 2012-Ohio-580, 964 N.E.2d 406 concerns the dismissal of an indictment based on the retroactive application of the Adam Walsh Act, which the Court had previously found impermissible, therefore the law did not apply to the defendant. *Palmer*, at ¶ 3. The Court's limited holding in *Palmer* is readily distinguishable from the facts of this case, which involves valid obstructing justice and perjury charges that clearly apply to Defendant.

To be sure, the Supreme Court of Ohio in *Palmer* was unequivocal that "a Crim. R. 12 ruling may not decide 'what would be the general issue at trial.'" *Id.*, at ¶ 22. Given that the Defendant is not challenging the lawfulness of the obstructing justice and/or perjury statutes, her argument is nothing more than an attempt to argue the merits of her case in a public forum prior to a trial in this matter. This is made obvious by the language in her motion, where Defendant alleges that the obstructing justice statute "does not apply to the facts of this case and that there

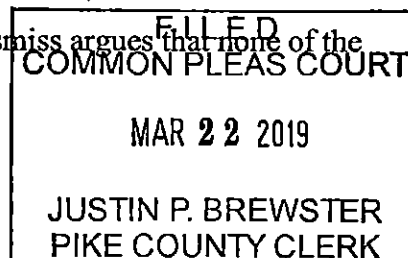


are “no facts to support” the charge of perjury. (Motion to Dismiss, p. 15). These arguments are ones that go to the general issue that will be presented at trial. They are not properly brought in a Crim. R. 12 motion to dismiss.

The Defendant does not argue that the State’s indictment is not valid on its face. She is not arguing that jurisdiction is improper, or that an element of the offenses for which she was indicted is unlawful. Rather, the Defendant asks this Court to look beyond the face of the indictment, challenge the prior findings of the Ohio grand jury, and improperly consider issues regarding weight and sufficiency of the State’s evidence supporting the indictment.

A motion which requires an examination of evidence beyond the face of the complaint is not a motion to dismiss. *State v. Brown*, 4th Dist. Athens No. 98CA14, 98CA15, 1999 Ohio App. LEXIS 1974, *15 (April 26, 1999). Rather, “when a defendant in a criminal action files a motion to dismiss which goes beyond the face of the indictment, he is, essentially, moving for summary judgment” *State v. Serban*, 5th Dist. Stark No. 2006 CA 00198, 2007-Ohio-3634, ¶29, citing *Lorain v. Slattery*, 9th Dist. No. 98CA007140, 1999 Ohio App. LEXIS 4357 (Sept. 22, 1999). However, because the Ohio Rules of Criminal Procedure do not allow for “summary judgment” on an indictment prior to trial, a defendant must wait and present such a challenge as a motion for acquittal at the close of the state’s case at trial. *Id.* “If a trial court considers and rules upon a motion to dismiss that goes beyond the face of the indictment the decision is strictly advisory and an improper exercise of judicial authority.” *State v. Richards*, 5th Dist. Stark No. 2007CA00331, 2008-Ohio-5965, ¶19; citing *State v. Varner*, 81 Ohio App. 3d 85, 86, 610 N.E. 2d 476 (9th Dist. 1991).

The Fourth District agrees. In *State v. Certain*, 180 Ohio App. 3d 457, 2009-Ohio-148, 905 N.E.2d 1259, ¶ 5 (4th Dist.), the court held that if a motion to dismiss argues that none of the

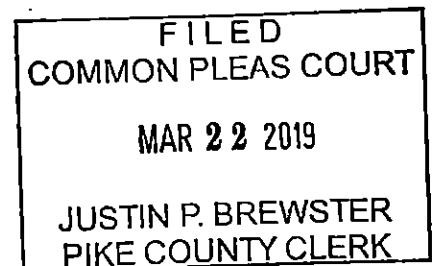


defendant's actions were criminal under the facts of the case, then the motion is improperly brought. *Id.* Any motion to dismiss requiring an examination of evidence beyond the face of the charging instrument must be presented pursuant to a motion for acquittal at the close of State's case. *Id.*; see also *State v. Brown*, 4th Dist. Athens No. 98CA14, 98CA15, 1999 Ohio App. LEXIS 1974, *16 (April 26, 1999). "Such a determination cannot be properly made until, at the earliest, the conclusion of the state's case in chief and pursuant to a Crim. R. 29(A) motion." *Serban*, 2007-Ohio-3634, at ¶27.

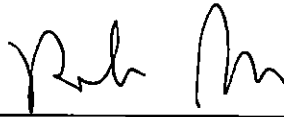
II. Conclusion.

The Defendant asks this Court to act in a manner that is contrary to its judicial authority under Crim. R. 12 and relevant Ohio case law. Here, the State's indictment is valid on its face, and the Defendant's pretrial motion asks this Court to look beyond the charging document and render an opinion regarding the sufficiency of the State's evidence supporting the indictment. Because this issue is incapable of determination without a trial of the general facts, it is not a pretrial motion that can be considered by this Court. Knowing that it has no obligation to argue its evidence prior to trial, the State has attempted in good faith to provide sufficient facts to educate the defense regarding the particulars of the indictment. Under Crim. R. 12, it would be improper to require the State to litigate the merits and sufficiency of its evidence prior to trial. The law requires Defendant to wait and present her argument as a motion for acquittal pursuant to Crim. R. 29, at the close of the State's case at trial.

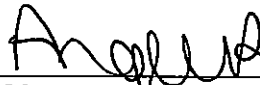
For all of the foregoing reasons, the State respectfully requests the Court overrule the Defendant's *Motion to Dismiss Indictment* and strike the Defendant's motion from the record.



Respectfully submitted,



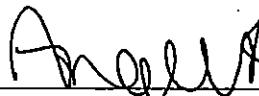
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CERTIFICATE OF SERVICE

This is to certify that a copy of the above Memorandum Contra Defendant's Motion to Dismiss and State's Motion to Strike was emailed to James D. Owen, Attorney for Defendant, on March 22, 2019.



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Special Assistant Prosecuting Attorney

